Supreme Court, U.S.
FILED

011494 DEC 10 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CARL P. WAKLEY

v.

OFFICE OF PERSONNEL MANAGEMENT

On Petition For Writ Of Certiorari
To The U.S. Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

CARL P. WAKLEY
Pro Se
1509 Mary Jean Avenue
Orlando, Florida 32809
(407) 857-8737

498

QUESTIONS PRESENTED FOR REVIEW

1. Is my information about medical problems or disabilities true?

2. Is my back trouble very bad?

3. Should I receive this Disability Retirement – FERS claim?

LIST OF PARTIES

Carl P. Wakley v. Office of Personnel Management

Carl P. Wakley - I am representing myself (pro se).

Janene Marasciullo - Trial Attorney for OPM.

Earl A. Sanders - General Counsel for OPM.

Copies also mailed to:

Solicitor General of the United States - Department of Justice
Bryant G. Snee - Department of Justice
David M. Cohen - Department of Justice

CORPORATE DISCLOSURE STATEMENT

Not applicable. I am an individual working for the United States Postal Service. I do not own a business.

I, Carl P. Wakley, am initiating or filing this Petition for Writ of Certiorari but I am not representing a business or corporation entity.

There is no parent corporation, publicly held company, or corporation stock to be involved here.

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TABLE OF AUTHORITIES

1. U.S. Merit Systems Protection Board
   ATTN: Margaret S. Cunningham
   Administrative Judge
   Atlanta Regional Office
   401 W. Peachtree Street, NW, Suite 1050
   Atlanta, GA 30308

2. The Clerk of the Board
   Merit Systems Protection Board
   ATTN: Beth A. Slavet, Chairman and
   Susanne T. Marshall, Member
   1120 Vermont Avenue, NW, Room 806
   Washington, D.C. 20419

3. The United States Court of Appeals
   for the Federal Circuit
   ATTN: Clevenger, Garjarsa and Dyk
   Circuit Judges
   717 Madison Place, NW
   Washington, D.C. 20439

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

Page Number

1. See Appendix A. The Initial Decision of Merit Systems Protection Board is to AFFIRM the Office of Personnel Management's reconsideration decision (this means my Application for Disability Retirement–FERS is denied). 9-17

U.S. Merit Systems Protection Board
ATTN: Margaret S. Cunningham
Administrative Judge
Atlanta Regional Office
401 W. Peachtree Street, NW, Suite 1050
Atlanta, GA 30308
Initial Decision of MSPB dated 3/30/00
MSPB Docket Number: AJ-844E-00-0203-I-1.
NOTE: PM# CSA 8 122 161 and #01-3183.

2. See Appendix B. The Final Order of Merit Systems Protection Board is "we conclude that there is no new, previously unavailable, evidence that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. §1201.115(d). 19-21

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. §1201.113.

The Clerk of the Board
Merit Systems Protection Board
ATTN: Beth A. Slavet, Chairman, and
Susanne T. Marshall, Member
1120 Vermont Avenue, NW, Room 806
Washington, D.C. 20419
Final Order of MSPB dated 1/3/01
MSPB Docket Number: AT-844E-00-0203-I-1.

3. See Appendix C. The Judgment Accompanied by opinion of U.S. Court of Appeals for the Federal Circuit is "We must affirm a final decision of the Board unless we determine that it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 C.F.R. §7703(c)(2000)."

Also, "The Supreme Court has denied us the authority to consider the merits of whether Mr. Wakley's condition warrants disability retirement benefits.

Because Mr. Wakley presents an issue which we lack authority to consider we lack jurisdiction to consider his contentions. We therefore DISMISS his petition for review." (Still denying my Application for Disability Retirement–FERS) 23-28

The United States Court of Appeals for the Federal Circuit
ATTN: Clevenger, Garjarsa and Dyk,
Circuit Judges
717 Madison Place, NY
Washington, D.C. 20439
Judgment Accompanied by Opinion, entered 10/4/01.

STATEMENT OF THE BASIS FOR JURISDICTION

Page Number

The Judgment Accompanied by Opinion was entered or filed on 10/4/01 by U.S. Court of Appeals for the Federal Circuit. 27

For this Petition to be timely, I am sending it to the Supreme Court in less than 60 days after the date of their letter February 25, 2002.

The U.S. Court of Appeals for the Federal Circuit states "The Supreme Court has decided that our authority to review the Board's decision is quite limited and narrow. We are not empowered to review the evidence offered by Mr. Wakley to provide entitlement to disability retirement benefits. The Supreme Court has limited our authority to determine whether any grave procedural error exists in the process by which the Board decided that the facts are not in Mr. Wakley's favor. These restrictions on our scope of review are set forth in Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985)."

Hopefully the Supreme Court will be able to review my polygraph or lie detector test results and both of Dr. Jack Gresham's 2 physician statements, which I believe are my two most important pieces of medical evidence.

CONSTITUTIONAL PROVISIONS

This may not apply to my "Petition for Writ of Certiorari" a whole lot but I am including a quote from Rules of the Supreme Court of the United States about matter of Importance to Public (footnote under Rule 10).

> "Certiorari is granted only in cases involving principles the settlement of which is of importance to public as distinguished from parties, and in cases where there is real and embarrassing conflict of opinion and authority between courts of appeals. NLRB v. Pittsburgh S.S. Co. (1951), 340 U.S. 498, 95 I; Ed 479, 71 S.Ct 453, 27 BNA LRRM 2382, 19 CCH LC §66192."

Carl P. Wakley
1509 Mary Jean Avenue
Orlando, FL 32809

April 8, 2002

Clerk of the Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Re: Petition for a Writ of Certiorari
OPM No.: 01-3183
MSPB No.: AT844E000203-I-1

Dear Sir/Madam Clerk:

You have already received and kept my check for $300 for the Docketing Fee.

In the Appendix are the conclusions reached by Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit.

My Disability Retirement – FERS claim case was dismissed or denied by the United States Court of Appeals for the Federal Circuit. Judgment was made or entered on 10/4/01 (also accompanied by an Opinion, copy enclosed).

The U.S. Court of Appeals for the Federal Circuit says that the Supreme Court does not give them the authority to review my evidence (or medical evidence) that I sent them. I hope you will be able to review my medical evidence. I had a little more medical evidence that I had sent to OPM in Washington, D.C. and to the Merit Systems Protection Board, but I believe the enclosed Sealed Polygraph Test Results or Lie Detector Test Results given by Mark Van Dusen Euiler, and Dr. Jack Gresham's two "Physician Statements", are my two strongest pieces of medical evidence.

As a matter of importance to the public, perhaps there have been other people in the Army or military who had not only gotten asthma before from cold weather, but may be from Florida or used to such warm environments that when going to the cold environment of Korea or Indiana may have gotten as sick as I did with sick stomach and so on. I was only in Korea in the Army one year, but others may have to endure this cold longer. The cold in Korea (about the same temperature as Washington, D.C.) may not seem that bad to most people, but what if you were born and raised in Washington, D.C. , then went to the Army to 1,000 or 1,500 miles north to Alaska – there might be a lot more to know about cold weather.

In order for this "Petition for a Writ of Certiorari" to be timely, I mailed it to you in less than 90 days after 10/4/01 (the date my case was decided and dismissed by the U.S. Court of Appeals for the Federal Circuit). Then I mailed a better one to you in less than 60 days after 1/15/02, the date of your previous letter. With this one I had included the Initial Decision and Final Order or decision of Merit Systems Protection Board, and Judgment and Opinion of the U.S. Court of Appeals for the Federal Circuit in the Appendix. When MSPB made their final order, they gave me the address of U.S. Court of Appeals for the Federal Circuit in order to appeal. But the last one still had some mistakes on it so now I am mailing the corrected one to you in less than 60 days after 2/25/02, the date of your last letter to me. It needed to comply with Supreme Court Rule 14.1.

Considering if I were in the military, fire department or police work, I am sure I could stick it out for another year or two until my twenty years were up, hopefully without undue consequences. The Postal Service is the second largest federal agency in this country. I believe that anyone who has worked for a long time perhaps may have had a little bit harder life than some, either through work, their personal life, or

natural causes, and should receive those benefits. With many years of federal service and with the medical problems endured over the years, I should be allowed Disability Retirement – FERS benefits.

I am mailing you basically the same information I mailed to the U.S. Court of Appeals for the Federal Circuit several months ago. They said the Supreme Court does not give them the authority to review the evidence (or medical evidence) that I sent to them. The polygraph or lie detector test results are, rather than medical evidence, a statement showing nearly a 100% probability that I am telling the truth. The truth that I have the medical problems or conditions is on the one-page statement (all in one paragraph) that is inside the sealed polygraph test results – even though I have not been to the doctor or not for a long time for the medical problems. For example, asthma is a life-long illness which could go away for many years but come back at any time during your life.

I am not sending you the 100 pages or so of information I mailed to the Office of Personnel Management in Washington D.C. and the Merit Systems Protection Board in Atlanta, Georgia, but I am mailing you the sealed polygraph or lie detector test results given to me by Mark Van Dusen Euiler, and sealed by him, showing there was .01 chance of deception – the best score you can make on the test (showing there was very, very little chance I could have been lying). I am also sending you Mark Van Dusen Euiler's resume to show his reputation and authenticity of the results.

After I initially sent my Application for Disability Retirement – FERS to the Office of Personnel Management in October 1998 and it was denied, then the Merit Systems Protection Board in Atlanta, Georgia also denied it. However, all along I have not heard mention of the sealed polygraph test results.

I am also sending you Dr. Jack Gresham's two

"Physician Statements" about my lower back trouble (I have more trouble with this than anything else). It also tells about my upper back or neck trouble. To help you interpret the two one-page Physician Statements – lumbar is lower back or lower back trouble, and cervical is upper back or neck trouble from whiplash in a car accident in May 1993.

Thank you.

Sincerely,

Carl P. Wakley

Carl P. Wakley
1509 Mary Jean Avenue
Orlando, FL 32809

REASONS FOR GRANTING THE WRIT

Just as an interesting side note, it may seem so far departed from the normal and accepted way of thinking, or a far fetched idea but I am related to a General Nathanial Greene who was in the Revolutionary War.

My great uncle Francis Greene, who died about a year and a half ago at the age of 91 or 92, had said he was an advisor to George Washington (a little over 200 years ago about the time the "Founding Fathers" drew up the Constitution to the United States.)

A lot of the rules the Government makes may seem funny or not needed. Perhaps these "Founding Fathers" were very smart (maybe smarter than you and I), but also may have known something that we do not know.

Maybe the government with all its duplication of papers has intended to help the U.S. citizens of generations to come, with statistics of information that is collected not just from myself but from many individuals about things that we may not know much about today.

Perhaps in the future they will be able to have a medicine for people in the military and so on that may continuously get very sick to their stomach, such as I did, in Korea, or other foreign countries, or cold environments. (See notarized paper entitled "Concerning the Disease of Asthma".) If you would like to verify about my Uncle Francis Greene you can call my father Donald Wakley, Sr. at 407-855-0266.

Although I am not in the military, police, or fire department, as mentioned it the "Petition for Writ of Certiorari", many people have retired from the federal government in 20 years or less due to their age of about 62, military service, police or fire department work. Even though I have worked for the U.S. Postal Service for nearly 20 years but not in one of those 4 categories – these several medical problems or disabilities which I

am claiming (14 in all sent to Office of Personnel Management), in my opinion, are nearly as serious as a major disability. Therefore, I believe my "Disability Retirement–FERS" Application should be approved.

APPENDIX

A. U.S. Merit Systems Protection Board
ATTN: Margaret S. Cunningham
Administrative Judge
Atlanta Regional Office
401 W. Peachtree Street, NW, Suite 1050
Atlanta, GA 30308
Initial Decision of MSPB dated 3/30/00.
MSPB Docket Number: AT-844E-00-0203-I-1.
NOTE: OPM # CSA 8 122 161 and # 01-3183.

B. The Clerk of the Board
Merit Systems Protection Board
ATTN: Beth A. Slavet, Chairman and
Susanne T. Marshall, Member
1120 Vermont Avenue, NW, Room 806
Washington, D.C. 20419
Final Order of MSPB dated 1/3/01
MSPB Docket Number: AT-844E-00-0203-I-1.

C. The United States Court of Appeals
for the Federal Circuit
ATTN: Clevenger, Garjarsa and Dyk,
Circuit Judges
717 Madison Place, NW
Washington, D.C. 20439
Judgment Accompanied by Opinion, entered 10/4/01.

D. Both of Dr. Jack Gresham's two physician statements.

E. Letter signed by Notary Public entitled "Concerning the Disease of Asthma".

F. The Mandate of my Judgment: Dismissed from U.S. Court of Appeals for the Federal Circuit.

G. SEALED Polygraph or Lie Detector Test Results (to be opened by Supreme Court only).

APPENDIX A

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

CARL P. WAKLEY, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. CSA 8 122 161	)	DOCKET NUMBER AT-844E-00-0203-I-1 DATE: MAR 30 2000

Carl P. Wakley, Orlando, Florida, pro se.

Charlretta McNeill, Washington, D.C., for the agency.

BEFORE

Margaret Cunningham
Administrative Judge

INITIAL DECISION

On December 6, 1999, the appellant filed a timely appeal with the Board's Atlanta Regional Office from a November 15, 1999 reconsideration decision issued by the Office of Personnel Management (OPM) denying his application for a disability retirement annuity. Inasmuch as the appellant did not request a hearing, this

decision is based on the written submissions of the parties. See 5 C.F.R. § 1201.58(b).[1]

The Board has jurisdiction over this appeal under 5 U.S.C. § 8451(a)(2)(C); 5 CR § 841.308. For the reasons below, OPM's reconsideration decision is AFFIRMED.

BURDENS OF PROOF

In an appeal before the Board from an OPM final or reconsideration decision on a voluntarily-initiated application for disability retirement, the burden rests with the appellant to prove, by a preponderance of the evidence, that he is entitled to those benefits. See Burns benefits. *See Burns v. Office of Personnel Management*, 58 M.S.P.R. 688, 691 (1993). In order to receive disability retirement benefits appellant must, while employed in a position subject to the Federal Employees' Retirement System (FERS), have become disabled for useful and efficient service in the position last occupied. 5 C.F.R. § 844.103(a)(2). In addition, accommodation in the position held must be unreasonable, and he must not be qualified for reassignment to a vacant position at the same grade or level in which he would be able to render useful and efficient service. 5 U.S.C. § 8451(a)(2); *Huttman v. Office of Personnel Management,* 48 M.S.P.R. 174, 177 (1991); 5 C.F.R. § 844.103(a) and (b).

The ultimate determination of disability is to be based on the probative value of all the evidence, taking into account objective clinical findings, diagnoses and expert medical opinions, subjective evidence of pain and disability, and evidence relating to the effect of the

---

[1]Just prior to the date on which the record closed, the appellant submitted a number of documents to me. The submission did not contain a certificate of service. However, every one of the documents is contained elsewhere in the record. I therefore did not reject the submission.

appellant's condition upon his ability to perform the duties of his position. *Swope v. Office of Personnel Management,* 7 M.S.P.R. 210, 211 (1981).

ANALYSIS AND FINDINGS

The appellant is a Mail Processor who works for the United States Postal Service (USPS) in Orlando, Florida. He has been employed by the USPS for 14 years and, in the cover letter to his appeal, he indicates that he works 40 hours per week.

In October 1998, the appellant applied for a disability retirement annuity and listed 14 medical conditions which he claims render him disabled. They are: (1) lower back trouble; (2) upper back and/or neck trouble; (3) heart trouble or chest pains; (4) eczema, dermatitis, (5) hypoglycemia similar to diabetes; (6) asthma--similar to emphasema; (7) arthritis or aching in shoulders; (8) carpal tunnel syndrome in wrists; (9) frequent urination; (10) bad teeth; (11) 2 broken fingers (12) knee trouble; (13) ingrown toenails; and (14) hurt right knee and left ankle. Agency File, Tab IID. The appellant indicated that these conditions rendered him disabled in May 1993. *Id.* In the supervisor's portion of the disability retirement application, the appellant's supervisor wrote that the appellant has no deficiency in either attendance or conduct and that he needs no accommodation. *Id.*

Although the file in this case is rather thick and there is a voluminous amount of documentation, this case is easy to resolve and requires no lengthy analysis.[2] This is so because not one doctor has indicated that the appellant cannot perform the duties of his position or is

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[2]One of the reasons the file is voluminous is because of the repetitiveness of the documents. The same document may appear five or more times in the agency file.

otherwise disabled. Moreover, there is absolutely no service deficiency documented in the record. Each of the appellant's medical conditions will be addressed below.

The doctor who treated the appellant for his lower back, upper back, and neck problems (items (1) and (2) above) was Dr. Jack Gresham. According to the record, the appellant was involved in a car accident in May 1993. Dr. Gresham held him off work between September 27, 1993, and October 1, 1993. He returned the appellant to full duty effective October 1, 1993. The next medical documentation concerning these problems is an August 26, 1998 memorandum written by Dr. Gresham. After examining the appellant, Dr. Gresham diagnosed him as having early generalized changes to the upper back and severe lower spondylosis. However, Dr. Gresham did not indicate that the appellant should remain off work or otherwise recommend any type of light duty status. Indeed, Dr. Gresham stated that the appellant "needs nothing more than conservative symptomatic management and a proper level of daily activities within the limits of physical tolerance without any other specific treatment to be recommended." Agency File, Tab IID. In a March 10, 1999, memorandum Dr. Gresham wrote that the appellant "has no need for any definitive orthopaedic treatment or further diagnostic evaluation of his musculoskeletal system at the present time. I recommend that he take aspirin daily for his rheumatic complaints." *Id.* Again, Dr. Gresham did not indicate that the appellant needed to be off work and did not recommend any type of accommodation

The appellant's heart trouble and chest pains (item (3) above) were determined by Dr. Gleen John Go in a memorandum dated September 4, 1998, to be stress related. *Id.* Dr. Go indicated that the appellant has had chest pains on and off for approximately 20 years. After examining the appellant on March 23, 1999, Dr. Go referred him for a stress test and recommended that he see a psychiatrist. *Id.* Dr. Jonathan Partain conducted

the stress test on the appellant and indicated in a March 30, 1999, memorandum that, since the test was normal, the probability that the appellant had heart problems was low. *Id.* In response to an inquiry from the appellant, Dr. Partain wrote him a note explaining that the stress test performed on March 30, 1999, was entirely normal in all respects. Agency File, Tab IIB.

There is no question that the appellant has eczema and/or psoriasis on his hands, knees, and lower legs (item (4) above). The record contains two memoranda from Dr. Steven Price, dated June 18, 1996, and December 8, 1998. Agency File, Tab IID. In the 1996 note, Dr. Price indicated that the biggest problem the appellant had with this condition was itching and dryness. *Id.* In his December 8, 1998, memorandum, Dr. Price noted that a medication called Lidex has been effective in controlling the condition. *Id.*

The hypoglycemia and asthma (items (5) and (6) above) of which the appellant complains were not medically documented except that the appellant underwent a test for diabetes and the test results reflected that he did not suffer from that condition. In his submissions, the appellant indicated that he was diagnosed with hypoglycemia at age 16 and believes that he might have a form of diabetes. However, that belief is not borne out by the medical documentation. And, neither is the asthma. Indeed, the appellant submitted a letter from a Dr. Herbert W. Collins, dated January 15, 1982, in which Dr. Collins wrote the following: "[appellant] has a history of having had asthma as a child with no difficulty recently. I examined [appellant] on January 5, 1982 and I believe he is in good health with no residual problems from his previous asthma as a child." Agency File, Tab IIB. There is not one bit of medical evidence in the record to document that the appellant currently suffers from either of these conditions.

The arthritis of which the appellant complaints (item (7) above) is nowhere clinically documented.

Dr. Gresham apparently examined the appellant's wrists for carpal tunnel syndrome (item (8) above). In his March 10, 1999, memorandum, Dr. Gresham found no evidence of any problems with the appellant's wrists. Agency File, Tab IID. Moreover, in one of his many submissions, the appellant indicated that he changed jobs 4 years ago from one that required typing and that his wrists no longer ache but he still feels that he has a weakness in his wrists.

The appellant's claim of frequent urination (item (9) above) was not medically documented. Moreover, it appears to be related to his claim of diabetes which, as noted above, is not a condition with which he was diagnosed.

The appellant also submitted a March 4, 1998, letter from his dentist, Dr. Jose Marcano (item (10) above). Agency File, Tab IID. Dr. Marcano indicated that the appellant had two cavities and 2 broken incisors but that he was not interested in having his teeth fixed.

The two broken fingers and knee trouble (items (11) and (12) above) were not documented by any medical evidence. In one of his submissions, the appellant indicated that he broke his fingers as a child playing baseball. However, it does not appear that he has sought treatment for these conditions or the remaining conditions of ingrown toenails and hurt right knee and ankle (items (13) and (14) above). With respect to the knee and ankle, the appellant indicated that he has had minor pain in those areas during the last four years.

As is evident from the above, the only medical condition that could remotely constitute a disabling condition is the appellant's lower back problem. However, as I also noted above, Dr. Gresham did not in any way indicate that the condition prevents the appellant from working. The appellant takes the position that while not one of the conditions may be of

itself disabling, when taken together, they make it difficult for him to work because of the pain they collectively cause. However, the appellant has not demonstrated that he has a service deficiency in either attendance or conduct, and he has not presented any medical evidence to the effect that any one, or all, of his conditions render him disabled. Moreover, evidence of pain is insufficient to establish entitlement to disability retirement absent a showing that the pain is sufficiently severe to render the appellant unable to perform his duties. *See Fadis v. Office of Personnel Management,* 48 M.S.P.R. 408, 411 (1991). For the foregoing reasons, I conclude that appellant has not meet his burden of proof and is thus not entitled to a disability retirement annuity. In so finding, I commend the appellant on his candor in his submissions. If, at some future date, he can present medical evidence documenting a disabling condition, he can certainly file another application with OPM for a disability retirement annuity.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD: s/Margaret S. Cunningham
Margaret Cunningham
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on MAY 04 2000, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more

than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW, Room 806
Washington, D.C. 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARL P. WAKLEY, Appellant, v.	)	DOCKET NUMBER AT-844E-00-0203-I-1
OFFICE OF PERSONNEL MANAGEMENT, Agency. CSA 8 122 161	)	DATE: JAN 3 2001

Carl P. Wakley, Orlando, Florida, pro se.

Charlretta McNeill, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that

establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: s/Matthew Shannan
for Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX C

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 10/04/01

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) in favor of the Respondent(s) under Rule 39. The part entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

JAN HORBALY
Clerk

cc: CARL P. WAKLEY
JANENE MARASCIULLO

WAKLEY V OPM, 01-3183
MSPB - AT844E000203-I-1

NOTE: Pursuant to Fed. Cir., R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-3183

CARL P. WAKLEY,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: October 4, 2001

Before CLEVENGER, GAJARSA, and DYK, Circuit Judges.
PER CURIAM.

Carl P. Wakley is a mail processor who works for the United States Postal Service. He seeks review in this court of the final decision of the Merit Systems Protection Board ("Board"), which affirmed the decision of the Office of Personnel Management ("OPM") denying his application for disability retirement benefits. Wakley v. Office of Pers. Mgmt., No. AT844E000203-I-1 (Jan. 3, 2001). We dismiss Mr. Wakley's petition for review.

I

After 14 years of government service in the Postal Service, Mr. Wakley filed an application for disability retirement benefits, citing a number of adverse medical conditions ranging from problems with his back to ingrown toenails. In order to qualify for disability retirement benefits a federal employee must prove entitlement to such benefits by a preponderance of the evidence. Mr. Wakley had to prove that he is disabled for useful and efficient service in the position he last occupied 5 C.F.R. §844.103(a)(2) (2001) and that accommodation in that position would be unreasonable and that he is not qualified for reassignment to a vacant positron at the same grade or level in which he would be able to perform useful and efficient service. 5 U.S.C. § 8451(a)(2) (2000). The ultimate decision as to whether a person has successfully established disability qualifying for disability retirement benefits is fact-intensive involving infer clinical findings diagnoses expert opinions and evidence showing that the adverse conditions impair the person's ability to perform his assigned work.

In this case OPM assessed Mr. Wakley's alleged impairments and concluded that he had failed to prove entitlement to disability retirement benefits. He appealed that decision to the Board and an Administrative Judge of the Board carefully reviewed the evidence offered by Mr. Wakley to prove his case. The Administrative Judge concluded that despite Mr. Wakley's many pains and sores he had not produced any evidence from any doctor indicating that he cannot perform his duties despite his pains and sores taken individually and in combination. The Administrative Judge therefore affirmed OPM's denial of Mr. Wakley's request for disability retirement benefits.

Mr. Wakley then petitioned the full Board for review of the adverse initial decision by the Administrative

Judge. The full Board denied that request, making the initial decision final for purposes of review by this court. Mr. Wakley then petitioned for review in this court.

II

We must affirm a final decision of the Board unless we determine that it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 7703(c) (2000). Mr. Wakley has had a full review of the facts of his case by the Board, and he has been unsuccessful there. The Supreme Court has decided that our authority to review the Board's decision is quite limited and narrow. We are not empowered to review the evidence offered by Mr. Wakley to prove entitlement to disability retirement benefits. The Supreme Court has limited our authority to determining whether any grave procedural error exists in the process by which the Board decided that the facts are not in Mr. Wakley's favor. These restrictions on our scope of review are set forth in Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985).

Therefore, the only issue that we can address is whether any grave procedural error exists in the process by which the Board concluded that Mr. Wakley is not entitled to the benefits he seeks. On this point, Mr. Wakley conceded that he had been given a full and fair hearing when he answered "No" to the question whether he had been denied any procedures during his appeal that relate to the fairness of the Board's adjudication of his claim. In his petition for review in this court, Mr. Wakley does not assert procedural error; instead he seeks our review of the facts, hoping that we would disagree with the Board on the medical merits of his case. As noted above, the Supreme Court has denied us the authority to consider the merits of whether Mr. Wakley's condition warrants disability retirement benefits.

Because Mr. Wakley presents an issue which we lack authority to consider, we lack jurisdiction to consider his contentions. We therefore dismiss his petition for review.

01-3183

APPENDIX D

JACK L GRESHAM MD, 441 MAITLAND AVE,
ALTAMONTE SPRINGS FL 32701 (407) 834-6605

Wakley, Carl P. -7- DOB: 11-26-55

03-10-99 OFFICE VISIT

CHIEF COMPLAINT: NECK, LOW BACK AND BOTH WRISTS

HISTORY: This patient has a long history of aching discomfort in the cervical and lumbar spine regions. He also has had some generalized aching discomfort in both of his wrists and occasionally a type of radicular type pain in his right upper extremity associated with his activities at work. At the present time he is having no radicular pain but he is having some aching discomfort in both wrists as well as his continuing low back and neck discomfort for which he was seen in this office and evaluated on 08-26-98.

PHYSICAL EXAMINATION: On examination today the patient presents in no acute distress and the findings of his neck and low back are compatible with that found in his visit of 08-26-98. On examination of his upper extremities he is noted to have a psoriatic rash involving the extensor surfaces of the MP and IP joints of the fingers of both hands. He is also noted to have some rash on the posterior surfaces of his elbows and anterior surfaces of his knees that are very mild. He is presently taking no medication for psoriasis but states that he does have a cream to use on occasion when the rash becomes irritated.

On further examination he demonstrates normal symmetrical configuration of the musculature of both arms and hands. He has good grip strength and normal manual dexterity to both hands, with no evidence of neurovascular deficit. He has a negative Tinel's sign over the median nerve in both wrist, and a negative Phalen's test for both wrist.

X-RAY EXAMINATION: A single AP view of both hands and wrist on a large film are obtained. The finger joints and wrist joints are well maintained with no evidence of joint damage or soft tissue calcification.

IMPRESSION: 1. Generalized rheumatic disorder associated with psoriasis; 2. Degenerative disc disease of the mid, cervical and lumbar spines without myelopathy.

COMMENT: This patient, in my opinion, has no need for any definitive orthopaedic treatment or further diagnostic evaluation of his musculoskeletal system at the present time. I recommended that he take two aspirin twice daily for his rheumatic complaints. If he has any continuing problem he will call for an appointment. kge

03-11-99 CC: Patient. kge

JACK L. GRESHAM MD, 62 W Columbia St., Orlando, FL 32806 849-0450

08-26-98 OFFICE VISIT - NEW PROBLEMS:

CHIEF COMPLAINT: LOW BACK AND NECK

HISTORY: This patient has a history of gradually increasing discomfort in his lower back and as well as his neck region over the past several months. He denies any recent history of injury. He has been treated in this office in the distant past for neck and back pain problems.

The patient complains of any extended periods of standing or walking, and any activity requiring mobility does cause recurrent low back pain. He also complains of generalize aching discomfort in his neck and shoulders with any extended periods of typing or reading or holding his neck in any rigid position.

PHYSICAL EXAMINATION: On examination today the patient presents with normal posture and gait. He bends forward at the waist to ninety (90) degrees with very low back pain only and no radiating pain into the hips or legs. The legs lengths are equal and he has normal symmetrical development of the musculature of both lower extremities, being able to stand on his toes without difficulty. The deep tendon reflexes are hypo-active but he has no definite neurologic deficit in either lower extremity. He has a fairly good range of motion to the head and neck with discomfort at the extremes in all ranges, but no evident neurologic deficit in either upper extremity.

X-RAY EXAMINATION: AP and lateral of the cervical spine and AP and lateral of the lumbar spine were obtained. The cervical spine reveals anterior marginal osteophytes at the C5-C6 level with early generalized degenerative changes in the mid and lower cervical spine, but no definite abnormality. The lumbosacral spine series reveal six lumbar vertebrae with almost complete obliteration of the L6-S1 space, and marked narrowing of the L5-S1 space with sclerosis of the adjacent vertebral surfaces. The remaining disc spaces and vertebral heights are well maintained with no evidence of congenital anomalies or other osseous abnormality.

IMPRESSION: 1. Early mid cervical spondylosis; 2. Severe lower lumbar spondylosis and disc degeneration.

DISPOSITION: This patient, in my opinion, has a rather marked limitation in physical capacity with regard to his low back. He has some mild cervical symptomatology related to specific activities which he should avoid. In my opinion, he needs nothing more than conservative symptomatic management and a proper level of daily activities within the limits of physical tolerance without any other specific treatment to be recommended. jl

08-27-98 CC: Patient. kge

APPENDIX E

From: Carl P. Wakley
1509 Mary Jean Ave.
Orlando, FL 32809
9/17/98
DOB: November 26, 1955
SSN: 267-21-6342

One copy to:
Social Security Administration

To: U.S. Office of Personnel Management
Retirement Operations Center
Boyers, PA 16017

Concerning the disease of ASTHMA

I have had ASTHMA since childhood and although I have rarely had asthma as a young strong adult, I have known since I was a child the disease stays with me my entire lifetime.

I was treated by Dr. John D. McKey, M.D. as a child for asthma and had been to see him many times. He gave me prescription medicine for several years and I have been told that this strong prescription medicine may have been responsible for the pitting and poor condition of my teeth.

I am having this certified by a notary public because I cannot obtain a copy of my medical records from Dr. John D. McKey, M.D. who retired about 7 months ago.

I have always my entire life kept a bottle of non-prescription Primatene tablets at hand in my medicine cabinet in case of an asthma attack because I worry about this and would be in no condition to drive a car to buy the medicine or to look all around the house for it.

I have always had to be careful my entire life because cold weather (and also smoke and dust) can not only cause an asthma attack but also I will get sick very easily in cold weather more so than most people. This may or may not have to do with asthma and the most marked incident is when I was in the Army in Seoul, Korea in 1984-85. During the 6 or 7 cold winter months about one a month I would get very sick to my stomach, have diarrhea, vomit and/or feel like vomiting, and feel very weak and tired and have very little resistance to the cold weather. The worst of this lasted 3 or 4 days and I was not back to normal for one week. All winter I felt cold and run down even if not sick. During the 4 or 5 warmer summer months I did not have this problem at all.

I am having a notary public certify that this letter is true and correct to the best of my knowledge on this day Thursday 9/17/98.

Sincerely,

s/ Carl P. Wakley
Carl P. Wakley
s/Carl P. Wakley

STATE OF FLORIDA
CO OF ORANGE

Before me this 17th day of September, 1998, appeared Carl P. Wakley who did swear this information is true and correct and who did produce a FL Driver's License as identification.

s/Josephine L. Hunt
Josephine L. Hunt, Notary Public

Josephine L. Hunt
Notary Public, State of Florida
Commission No. CC 608153
My Commission Exp. 12/16/2000
Bonded through Fla. Notary Service & Bonding Co.

Comm. Exp. 12-16-2000

APPENDIX F

United States Court of Appeals
for the Federal Circuit

01-3183

CARL P. WAKLEY,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). AT844E000203-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

DISMISSED

ENTERED BY ORDER OF THE COURT

DATED OCT 4, 2001

s/Jan Horbaly / ksr
Jan Horbaly, Clerk

ISSUED AS A MANDATE: November 26, 2001

APPENDIX G

SEALED Polygraph or Lie Detector Test Results
(to be opened by Supreme Court only)

BOUND SEPARATE ENCLOSURES

1. Notarized Certificate of Service.

2. Both of Dr. Jack Gresham's two physician statements.

3. Resume of Mark Van Dusen Euiler, polygrapher tester.

4. Page about matter of importance to public from Rules of the Supreme Court.

5. Letter signed by Notary Public entitled "Concerning the Disease of Asthma."

6. One additional SEALED Polygraph Test Results (to be opened by Supreme Court only).